

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 11, 2008 Session

**VIRGINIA L. RICKETTS ET AL. v. CHRISTIAN CARE CENTER OF
CHEATHAM COUNTY, INC. ET AL.**

**Appeal from the Circuit Court for Cheatham County
No. 5692 George C. Sexton, Judge**

No. M2007-02036-COA-R9-CV - Filed August 15, 2008

This is an interlocutory appeal concerning the enforceability of an arbitration agreement included in a nursing home's admission agreement. The trial court ruled that the arbitration agreement was enforceable. Because we find that the person who signed the admission agreement did not have the authority to act for the decedent, we reverse the decision of the trial court.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Circuit Court Reversed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Lisa Erickson Circeo and Deborah Truby Riordan, Nashville, Tennessee; Brian G. Brooks, Greenbrier, Arkansas; and Susan Nichols Estes, Little Rock, Arkansas, for the appellants, Virginia L. Ricketts, as administratrix of the Estate of Mary Lenore Williamson, deceased, and on behalf of the wrongful death beneficiaries of Mary Lenore Williamson.

Christy Tosh Crider, Sonya R. Smith, and John Michael Phillips, Nashville, Tennessee, for the appellees, Christian Care Center of Cheatham County, Inc. and Care Centers Management of Cheatham County, Inc.

OPINION

Virginia Ricketts is the daughter of Mary Lenore Williamson and the administratrix of Ms. Williamson's estate. Ms. Williamson was admitted to the Christian Care Center of Cheatham County ("Christian Care") on June 20, 2002. The nursing home's license holder and manager changed in 2003. On August 13, 2003, Ms. Ricketts was asked to sign a new admission agreement to readmit her mother into the facility under the new management. Ms. Ricketts signed as her mother's "representative." The admission agreement contained an arbitration provision requiring that "all disputes and disagreements between the Facility and Resident (or their respective successors, assigns or representatives) arising out of the enforcement or interpretation of this

Agreement or related hereto or to the services provided by Facility . . . shall be submitted to binding arbitration . . .” Ms. Williamson was a resident of Christian Care until April 6, 2005. She died on May 12, 2005.

On September 20, 2005, Ms. Ricketts filed this lawsuit on behalf of Ms. Williamson’s estate and her wrongful death beneficiaries against Christian Care and Care Centers Management of Cheatham County, Inc., the company that owned and managed the Christian Care facility. The complaint alleged negligence; gross negligence, willful, wanton, reckless, malicious, and/or intentional conduct; negligence pursuant to the Tennessee Medical Malpractice Act; violations of the Tennessee Adult Protection Act; and survival and wrongful death claims. The complaint included the allegation that “[a]t all times during her residency, Mary Lenore Williamson was incapable of taking care of herself and incapable of attending to any business; thus she was of unsound mind as that term is used in Tenn. Code. Ann. § 28-1-106 (1999).”¹

The defendants filed a motion to compel arbitration, which was initially denied by the trial court on December 9, 2005, based upon *Raiteri ex rel. Cox v. NHC Healthcare/Knoxville, Inc.*, No. E2003-00068-COA-R9-CV, 2003 WL 23094413 (Tenn. Ct. App. Dec. 30, 2003).² On January 8, 2007, Christian Care filed a motion to reconsider based upon *Owens v. Nat’l Health Corp.*, No. M2005-01272-COA-R3-CV, 2006 WL 1865009 (Tenn. Ct. App. June 30, 2006), *aff’d in part, vacated in part*, M2005-01272-SC-R11-CV, 2007 WL 3284669 (Tenn. Nov. 8, 2007) (pet. for cert. filed May 2, 2008).³ The trial court granted the motion to reconsider, reversed its previous decision, and ordered the parties to attend arbitration. On August 31, 2007, the court granted Ms. Ricketts’ motion for permission to file this interlocutory appeal.

Ms. Ricketts has raised a number of issues on appeal, which can be summarized as follows: (1) Whether the trial court erred in reconsidering and reversing its order of December 9, 2005, denying the defendants’ motion to compel arbitration; (2) whether the trial court erred in finding that Ms. Ricketts had the authority to sign the admission agreement; (3) whether the arbitration

¹Tenn. Code Ann. § 28-1-106 provides:

If the person entitled to commence an action is, at the time the cause of action accrued, either within the age of eighteen (18) years, or of unsound mind, such person, or such person’s representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from the removal of such disability.

²In *Raiteri*, the court held that the patient’s husband did not have the authority to bind her to the admission agreement and that the mediation and arbitration terms of the agreement were unenforceable. *Raiteri*, 2003 WL 23094413, at *9.

³The Court of Appeals in *Owens* reversed the trial court’s decision that the patient’s attorney-in-fact did not have the authority to sign the arbitration agreement and remanded for an order compelling arbitration. *Owens*, 2006 WL 1865009, at *10. The Supreme Court agreed with the Court of Appeals that the patient’s attorney-in-fact had authority to sign the arbitration agreement, but remanded for further proceedings on the issue of whether the arbitration agreement was unconscionable. *Owens*, 2007 WL 3284669, at *12.

provisions were unconscionable; and (4) whether Tenn. Code Ann. § 29-5-101 prevents the enforcement of an arbitration agreement executed by a health care surrogate on behalf of an incompetent.

Analysis

This court reviews the denial of a motion to compel arbitration under the same standards applicable to bench trials. *Cabany v. Mayfield Rehab. & Special Care Ctr.*, No. M2006-00594-COA-R3-CV, 2007 WL 3445550, *3 (Tenn. Ct. App. Nov. 15, 2007); *Spann v. Am. Express Travel Related Servs. Co., Inc.*, 224 S.W.3d 698, 706 (Tenn. Ct. App. 2006) (perm. app. denied Jan. 29, 2007). The trial court's findings of fact are reviewed "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). If the trial judge did not make specific findings of fact, we review the record to determine where the preponderance of the evidence lies. *Reagan v. Kindred Healthcare Operating, Inc.*, No. M2006-02191-COA-R3-CV, 2007 WL 4523092, *8 (Tenn. Ct. App. Dec. 20, 2007); *Hardcastle v. Harris*, 170 S.W.3d 67, 78-79 (Tenn. Ct. App. 2004). Our consideration of "the preponderance of the evidence is tempered by the principle that the trial court is in the best position to assess the credibility of the witnesses; accordingly, such credibility determinations are entitled to great weight on appeal." *Rice v. Rice*, 983 S.W.2d 680, 682 (Tenn. Ct. App. 1998). Review of a question of law is also de novo, but "with no presumption of correctness afforded to the conclusions of the court below." *King v. Pope*, 91 S.W.3d 314, 318 (Tenn. 2002) (quoting *State v. McKnight*, 51 S.W.3d 559, 562 (Tenn. 2001)).

We need address only one of the issues: whether Ms. Ricketts had the authority to sign the admission agreement on behalf of her mother.⁴ We have concluded that she did not.

In order to bind Ms. Williamson to the arbitration agreement, Ms. Ricketts must have had authority to act as her agent or surrogate. See *Thornton v. Allenbrook Nursing & Rehab. Ctr., LLC*, No. W2007-00950-COA-R3-CV, 2008 WL 2687697, *5 (Tenn. Ct. App. July 3, 2008); *Raiteri*, 2003 WL 23094413, at *9. It is undisputed that Ms. Ricketts did not possess a power of attorney or guardianship over her mother's affairs. In *Raiteri*, the deceased patient's husband signed the admission forms. *Raiteri*, 2003 WL 23094413, at *1. The patient had not been determined to be incompetent. *Id.* There was no evidence that the husband had express or apparent authority to sign for the patient. *Id.* at *9. The court concluded that the evidence preponderated "against the trial court's implicit decision that [the husband] had authority to sign the admission agreement on behalf of his wife." *Id.* The defendants argue that *Raiteri* is distinguishable because the patient in *Raiteri* was still mentally competent and Ms. Williamson was not. Even if we assume that Ms. Williamson was not competent at the time that Ms. Ricketts signed the agreement, that fact does not make a difference in the result. Ms. Ricketts must have some basis of authority. In *Raiteri*, the patient could have given her husband express or apparent authority to sign for her, but there was no evidence that

⁴The parties agree that Tennessee law, not federal law, applies in this case since the admission agreement provided that "the laws of the State in which the Facility is located" would govern.

she had done so. *See Necessary v. Life Care Ctrs. of America, Inc.*, No. E2006-00453-COA-R3-CV, 2007 WL 3446636, *1 (Tenn. Ct. App. Nov. 16, 2007) (wife had oral express authority to sign admission documents for husband). If Ms. Ricketts was not competent at the time she was readmitted, she no longer had the ability to give authority to her daughter.

In *Thornton*, the patient's daughter signed the admissions documents, including an arbitration agreement, at the time of the patient's admission to the nursing home. *Thornton*, 2008 WL 2687697, at *1. At that time, the patient had not given her daughter a durable power of attorney or a power of attorney for health care decisions. *Id.* at *6. The nursing home conceded that the patient was mentally competent at all relevant times. *Id.* The court described *Raiteri* and later cases as "finding authority if given expressly, either through oral expression or via a Power of Attorney document, and finding no authority if the principal did not exhibit some sort of act to convey the authority." *Id.* at *7. In the present case, as in *Raiteri* and *Thornton*, the family member who signed the arbitration agreement did not have authority to act as the patient's agent.

The trial court accepted the defendants' argument that Ms. Ricketts had authority to sign for her mother pursuant to the Tennessee Health Care Decisions Act, Tenn. Code Ann. § 68-11-1801, *et seq.* Tenn. Code Ann. § 68-11-1806(c)(1) provides:

In the case of a patient who lacks capacity, has not appointed an agent, has not designated a surrogate, and does not have a guardian, or whose agent, surrogate, or guardian is not reasonably available, the patient's surrogate shall be identified by the supervising health care provider and documented in the current clinical record of the institution or institutions at which the patient is then receiving health care.

A major problem with this argument is that the Tennessee Health Care Decisions Act did not take effect until July 1, 2004. 2004 Tenn. Pub. Acts ch. 862. The agreement at issue was signed by Ms. Ricketts in August 2003.

The defendants maintain that the trial court did not err in applying the Tennessee Health Care Decisions Act retroactively. Article 1, section 20 of the Tennessee Constitution provides that "no retrospective law, or law impairing the obligations of contracts, shall be made." The presumption is that a statute operates prospectively "unless the legislature clearly indicates otherwise." *Nutt v. Champion Int'l Corp.*, 980 S.W.2d 365, 368 (Tenn. 1998). There is an exception to the rule of prospective-only application for statutes considered remedial or procedural in nature. *Id.* at 368 (citing *Shell v. State*, 893 S.W.2d 416, 419 (Tenn. 1995)). A procedural or remedial statute "does not affect the vested rights or liabilities of the parties." *Id.*

We find nothing in the Tennessee Health Care Decisions Act evidencing an intent for the statute to operate retroactively. We further find that this statute is neither remedial nor procedural. Rather, the Tennessee Health Care Decisions Act affects what our courts have described as a fundamental right: personal autonomy, which includes the ability to make one's own decisions about health care. *Cabany*, 2007 WL 3445550, at *5. Moreover, as a matter of contract law, retroactive

application of the surrogacy provisions of the statute could lead to the anomalous result of validating the contract even though, at the time when the contract was signed, Ms. Ricketts did not have authority to act for her mother.

We conclude that Tennessee's Health Care Decisions Act does not apply retroactively. Thus, Ms. Ricketts was without authority to sign the admission agreement for her mother.

The defendants also argue that Ms. Williamson was a third party beneficiary of the admission agreement and is therefore bound by the agreement. In the case upon which the defendants rely, *Benton v. Vanderbilt Univ.*, 137 S.W.3d 614 (Tenn. 2004), an arbitration provision was held to be enforceable against a third party patient seeking to enforce a contract between a hospital and an insurance company. That case involved a valid contract between the hospital and an insurance company. There is no valid contract in this case because Ms. Ricketts had no authority to bind her mother.

The defendants' argument appears to be based upon the premise that, even if Ms. Ricketts lacked authority to act on behalf of her mother, there was a contract between Ms. Ricketts and Christian Care. Relying on this premise, the defendants assert that Ms. Williamson was an intended third party beneficiary of the contract. We are aware of caselaw from other jurisdictions in which a nursing home contract signed by a family member on behalf of the resident or as a "responsible party" has been characterized as a contract between the family member and the nursing home, with the resident being a third party beneficiary of the contract. See *J.P. Morgan Chase & Co. v. Conegie ex rel. Lee*, 492 F.3d 596 (5th Cir. 2007) (mother found to have authority to sign as surrogate for daughter, but third party beneficiary theory cited as alternative theory to bind daughter); *Alterra Healthcare Corp v. Estate of Linton ex rel. Graham*, 953 So. 2d 574 (Fla. Dist. App. Ct. 2007) (finding resident to be third party beneficiary of residency agreement); *Trinity Mission Health & Rehab. of Clinton v. Estate of Johnson*, No. 2006-CA-01053-COA, 2008 WL 73682, *3 (Miss. Ct. App. Jan. 8, 2008) (finding mother to be third party beneficiary of contract between nursing home and daughter); *Trinity Mission of Clinton, LLC v. Barber*, No. 2005-CA-02199-COA, 2007 WL 2421720, *6 (Miss. Ct. App. Aug. 28, 2007), *cert. granted*, 977 So. 2d 1144 (Miss. Mar. 13, 2008) (finding no authority for son to bind his mother to admission agreement, but finding mother to be third party beneficiary of contract between son and nursing home).

We do not find these authorities persuasive here. Third party beneficiary concepts should not be used to circumvent the threshold requirement that there be a valid arbitration agreement. Ms. Ricketts signed the admission agreement as Ms. Williamson's "representative." She was not entering into a contract on her own behalf, but as her mother's representative. The issue in this case is whether Ms. Ricketts had authority to act as her mother's agent and to enter into a contract on her behalf. If she did not have authority, there is no valid contract. Without a valid contract, there can

be no third party beneficiary. Rejecting a similar third party beneficiary argument, the Mississippi Supreme Court stated:

Here, the trial court reasoned in accordance with the stipulations of the parties that “nobody had the authority to speak for [the patient] except himself,” and therefore “there is no binding written contract between [the patient] and the nursing home requiring arbitration.” We find this reasoning persuasive. Any wrongful death beneficiaries of [the patient] can be bound only to the extent he would be bound. Because there was no contract between [the patient] and the nursing home in the first place, no arbitration clause exists to be enforced against the wrongful death beneficiaries of [the patient].

Grenada Living Ctr., LLC v. Coleman, 961 So.2d 33, 38 (Miss. 2007). We agree with this reasoning. Application of the defendants’ theory would effectively negate the requirement that a surrogate must have authority in order to bind a patient.

Conclusion

Because Ms. Ricketts did not have authority to sign the admission agreement on her mother’s behalf, the arbitration provisions are not enforceable against Ms. Williamson’s estate and wrongful death beneficiaries. We therefore reverse the decision of the trial court. Costs of appeal are assessed against the appellees.

ANDY D. BENNETT, JUDGE